



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :
- against - : FINAL
Police Officer Ernesto Marks : ORDER
Tax Registry No. 946759 : OF
Housing PSA 6 : DISMISSAL
-----X

Police Officer Ernesto Marks, Tax Registry No. 946759, having been served with written notice, has been tried on written Charges and Specifications numbered 2018-19127, 2018-19143, and 2020-21688, as set forth on forms P.D. 468-121, dated June 8, 2018, June 14, 2018, and February 7, 2020, respectively, and after a review of the entire record, Respondent is found Guilty of the charged misconduct.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Ernesto Marks from the Police Service of the City of New York.


DERMOT F. SHEA
POLICE COMMISSIONER

EFFECTIVE: 9/28/2021



POLICE DEPARTMENT

May 5, 2021

-----X

In the Matter of the Charges and Specifications	:	Case Nos.
- against -	:	2018-19127
Police Officer Ernesto Marks	:	2018-19143
Tax Registry No. 946759	:	2020-21688
Housing PSA 6	:	

-----X

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Javier Seymore, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

COURTESY • PROFESSIONALISM • RESPECT

Website: <http://nyc.gov/nypd>

CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2018-19127

1. Said Police Officer Ernesto Marks, while assigned to the 66th Precinct, on or about June 7, 2018, while off-duty, in Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer Marks wrongfully engaged in a physical altercation with his girlfriend (referred to hereinafter as "Complainant").

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT
GENERAL REGULATIONS

2. Said Police Officer Ernesto Marks, while assigned to the 66th Precinct, on or about June 7, 2018, while off-duty, in Kings County, after being involved in a domestic incident, did fail and neglect to remain at the scene of incident and request the response of patrol supervisor, precinct of occurrence.

P.G. 212-32, Page 1,
Paragraphs 1 & 2

OFF DUTY INCIDENTS INVOLVING
UNIFORMED MEMBERS OF THE
SERVICE

Disciplinary Case No. 2018-19143

1. Said Police Officer Ernesto Marks, while on suspension without pay, on or about June 12, 2018, while in Kings County, did wrongfully violate [REDACTED] Order of Protection # [REDACTED], issued on behalf of Complainant, in that he appeared near her residence.

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT
GENERAL REGULATIONS

Disciplinary Case No. 2020-21688

1. Said Police Officer Ernesto Marks, while assigned to the 66th Precinct, on or about and between November 16, 2018 and February 22, 2019, while on and off-duty, in Kings County, did knowingly associate with persons or organization reasonably believed to be engaged in, likely to engage in, or to have engaged in criminal activities.

P.G. 203-10, Page 1, Paragraph 2(C)

PUBLIC CONTACT –
PROHIBITED CONDUCT

2. Said Police Officer Ernesto Marks, while assigned to the 66th Precinct, on or about November 16, 2018, while on-duty, wrongfully engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer made inaccurate and misleading statements during his official Department interview.

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT

3. Said Police Officer Ernesto Marks, while assigned to the 66th Precinct, while on-duty, on or about and between November 16, 2018 and February 22, 2019, after being lawfully ordered by New York City Police Sergeant Steven Silverstein to terminate his relationship with an individual known to the Department, said Police Officer failed to comply with said order.
P.G. 203-03, Page 1, Paragraph 2 COMPLIANCE WITH ORDER
4. Said Police Officer Ernesto Marks, while assigned to the 66th Precinct, on or about and between May 8, 2018 and June 1, 2019, while on-duty, in Kings County, did improperly utilize a Department computer to conduct computer inquiries in Department databases on eight (8) separate occasions, which were not related to said Police Officer's assignment.
P.G. 219-14, Page 1, Paragraph 2 DEPARTMENT COMPUTER SYSTEM

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me remotely on February 4 and 17, and March 3, 4 and 8, 2021. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Lieutenant John Orecchia, Sergeant Brandon LoMonaco, Sergeant Steven Silverstein, Police Officer Stefanie Gosik and Police Officer Danny Fitton as witnesses. The Department offered the hearsay statements of Complainant and Witness #2 in evidence¹. Respondent called Grady Zellars, Gloria Miles and Maurice Joiner as witnesses, and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent:

Guilty of Specifications 1 and 2 in Disciplinary Case No. 2018-19127

Guilty of Specification 1 in Disciplinary Case No. 2018-19143

Guilty of Specifications 1, 2, 3 and 4 in Disciplinary Case No. 2020-21688

I recommend that Respondent be DISMISSED.

¹ The identities of Complainant and Witness #2 are known to the Tribunal.

ANALYSIS

The following is a summary of the facts which are not in dispute.

Respondent and Complainant were involved in an intimate relationship for a period of months prior to June 7, 2018 (T. 228, 260; Dept. Ex. 2A at 3-4). They were, at that time, both residents of the same borough, whose residence addresses are known to the Tribunal. They were also both members of [REDACTED] Church, located at [REDACTED], Brooklyn, New York (T. 155, 160; Dept. Ex. 2A at 5). Respondent is a musician at the aforementioned church (T. 155, 207, 227).

From approximately 1430-1508 hours on June 7, Respondent and Complainant had an interaction at her home, the circumstances of which are in dispute. When Respondent left Complainant's residence, he was in possession of several personal items she had returned to him (T. 265-267).

At approximately 2020 hours, Police Officers Gosik and Fitton responded to Complainant's residence after being dispatched on a report of "10-52 family domestic with MOS involved" (T. 24, 53; Dept. Ex. 2A). Lieutenant Stephen Sperrazza of the 73rd Precinct also responded to the call (T. 53, 54). When they entered the location, they met with Complainant on the first floor, who identified herself as the person who had called 911 but "attempted to cancel" (T. 25, 27, 40, 47, 55; Dept. Ex. 8). After being interviewing by Lieutenant Sperrazza for a short while, Complainant and Police Officer Gosik went to the kitchen, where she told Gosik that she had a dispute with Respondent, during which he grabbed her throat with his hand (T. 31, 55). Complainant was transported to the 73rd Precinct where she was interviewed by, among others, Sergeant LoMonaco (T. 26, 27, 62; Dept. Ex. 2A, 2B). At the 73rd Precinct, Complainant repeated her allegation that Respondent had grabbed her around her throat and added that he also

grabbed her arm (T. 32, 65). Photographs of Complainant's neck and arm were taken during the interview (T. 77-81, 82-87, 88-90, 91-94; Dept. Ex. 5).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On June 12, Domestic Violence officers from the 73rd Precinct visited Complainant's residence on a post-incident wellness check (T. 68, 101). During that visit, Complainant told the officers that Respondent had been at her residence earlier that day, which would violate an order of protection (T. 68). Complainant was later interviewed at the 73rd Precinct, where she informed investigators that she had observed Respondent from the window of her residence while he was in a vehicle. She made this observation while with a friend of hers, Witness #2 (T. 70-71). Complainant and Witness #2 were both interviewed in person by Sergeant LoMonaco (T. 71-75; Dept. Exs. 3A, 3B, 4A, 4B).

[REDACTED]

[REDACTED]

[REDACTED]

The findings in these cases will turn on credibility assessments of the witnesses who appeared before the Tribunal, as well as the reliability of hearsay evidence offered by the Department in its case in chief. While there is no dispute that Respondent and Complainant were involved in an intimate relationship, they each asserted that the relationship was over but for different reasons.

They also shared common interests: they belonged to the same church and they had a friend in common, Maurice Joiner, who was a fact witness in this case. The parties also were likely concerned about damage to their respective reputations: Complainant, who identified her profession as an exotic dancer, is a single mother of two children. Respondent is a Uniformed Member of Service.

In a misconduct case involving allegations of domestic violence, the respective motivations of the parties to provide truthful information must always be carefully considered. The behaviors of the parties before and after the incident in question, when placed in proper context, may also reveal evidence relevant to a credibility assessment. Finally, the degree to which competing narratives are logical and corroborated by independent evidence must be part of the credibility findings.

Based upon the totality of the record, I find that Complainant's two hearsay statements bear sufficient indicia of reliability upon which to base findings of fact. I make this finding mindful that she did not appear before the Tribunal and present herself for examination; nevertheless, her statements were logical and consistent with other credible evidence in the case. As set forth in detail below, the timing of her initial outcry, the circumstances under which she made her statements and the substance of those statements, taken together, strongly support a finding that her statements are credible.

I further find the testimonies of the Members of Service who were called by the Department: Lieutenant Orecchia, Sergeant LoMonaco, Police Officer Gosik and Police Officer Fitton, to be credible, forthright and consistent with the performance of their professional duties.

In contrast, I find that Respondent's testimony before the Tribunal was permeated with self-interest. While any Respondent is interested in the outcome of the proceeding by virtue of

the potential adverse consequences of a guilty finding, in this case, Respondent's self-serving testimony and the selectivity of the evidence he presented in his defense made clear his incentive to advance a false narrative.

In that regard, I find Maurice Joiner, one of Respondent's witnesses, to have demonstrated a strong bias in favor of Respondent, which renders his testimony of little probative value. Joiner's conviction for the crime of impersonating a police officer casts a further cloud over his veracity, independent of his bias.

I find that Respondent's remaining witnesses, Grady Zellars and Gloria Miles, testified candidly based upon their individual recollections. Despite the reality that they may harbor some bias in favor of Respondent by virtue of their long association with him, I did not find that such bias colored their testimony. I do find, however, that the nature of the testimony they offered (*i.e.* alibi) was insufficiently specific to have much probative value.

The following is a summary of the relevant trial evidence.

Disciplinary Case No. 2018-19127: Domestic Incident

Police Officer Fitton testified that on June 7, 2018, he and his partner, Police Officer Gosik, entered Complainant's residence² and spoke with her (T. 55). Complainant informed Fitton that she was involved with a police officer but asserted that she attempted to call the 911 operator to state that she no longer required police services (*Id.*). Fitton did not have any further discussion with Complainant, as Gosik took her into another room to interview her (*Id.*). He did

² Complainant's address is known to the Tribunal.

observe that she seemed upset, but she never stated the reason for her initial call to 911 while she was in his presence³ (T. 56).

Police Officer Stefanie Gosik testified that on June 7, 2018, she entered Complainant's residence with Police Officer Fitton; Complainant identified herself as the person who called 911 (T. 25). Gosik testified that she did not recall the information Complainant gave her at that point, other than to allege that she had been involved in a domestic incident (T. 26). According to Gosik, Complainant became "standoffish or hesitant to speak to [her] because she didn't feel [she] was going to listen, to take her side" (T. 27). Complainant also said she wanted to "cancel" (*Id.*).

While inside Complainant's apartment, Gosik noticed that Complainant kept making eye contact with her while Lieutenant Sperrazza interviewed her; Gosik took Complainant into the kitchen in order to speak to her away from the other police officers (T. 31). Once they entered the kitchen, Complainant began crying and told Gosik that she had a dispute with Respondent where he grabbed her around her neck (*Id.*). Gosik recalled that Complainant stated the argument was over another woman (T. 33). Complainant complained of being sore because of the assault (T. 35).

Sergeant Brandon LoMonaco testified that on June 7, 2018, he was assigned to the Brooklyn North Investigations Unit (T. 61). On that date, he responded to a "call out" of an off-duty alleged domestic incident involving Respondent and Complainant (*Id.*). Sergeant LoMonaco went to the 73rd Precinct, where he was briefed by Captain Allison Esposito, the Executive Officer of the 73rd Precinct (*Id.*). He then interviewed Complainant at the precinct,

³ The 911 call was not offered in evidence. During the course of the investigation, it was discovered that the call was made at approximately 2020 hours and directed police to [REDACTED], first floor apartment (Dept. Ex. 2A at 3).

who said that she was at her home when Respondent, who was off duty, came to her residence. Complainant told Respondent that she did not want to speak to him and did not wish to interact with him (T. 64). According to Complainant, Respondent then grabbed her arm with one hand and her throat with the other (T. 65, 80-81, 82-83). Complainant claimed that she screamed and Respondent let go of her arm and throat (*Id.*). Complainant further claimed that “Neighbor”⁴ was inside her own apartment in the building at the time she had her encounter with Respondent (*Id.*). Sergeant LoMonaco photographed Complainant’s arms and neck during Complainant’s interview (T. 77-87; Dept. Ex. 5). He was unable to identify any discoloration, cuts, abrasions or dried blood in the photograph of Complainant’s arm; he was, however, able to discern a contusion in her upper right neck area (T. 88-90, 92-93; Dept. Ex. 5). Sergeant LoMonaco could not recall whether Complainant requested medical treatment (T. 93). Complainant told Sergeant LoMonaco that she wanted to prosecute and would press charges against Respondent (T. 65-66). Her hearsay statement was entered into evidence as Department Exhibit 2A.

In her statement, Complainant asserted that on June 7, 2018, she had been watching a basketball game when she received a call from Respondent (Dept. Ex. 2A at 3). Respondent told her, “Some girl had called from a while ago.” Complainant told Respondent that she would call him back, and then called the woman Respondent alluded to, as Complainant knew her (*Id.* at 4).

In the telephone conversation that followed, Complainant asked the woman what was going on with her and [Respondent]. The woman replied that nothing was going on: he was “a trick.” Complainant clarified for investigators that she interpreted that statement from the woman to mean that Respondent had paid the woman for sex. Complainant then told the woman, “Please don’t call him because, you know, he’s making it seem like you’re calling him

⁴ “Neighbor” was identified only by her first name but is known to the Tribunal.

or bothering him.” The woman agreed, replying, “Well, I don’t want to deal with him; like, he’s a cop or whatever.” Complainant replied, “Okay, well just leave it alone, we don’t need no problems . . . you’re my friend, we’re cool.” Complainant stated that she then received a call from another woman, “and she’s telling me the same exact thing” (*Id.* at 5).

Respondent then called Complainant and asked her, “Did you call the girl?” When Complainant replied that she had, Respondent then told her, “Well, stop calling her because she’s lying.” Complainant told Respondent, “Listen, I don’t even care.” Complainant stated that the woman told her that Respondent “was down and an underground spy.” Because of these conversations, Complainant blocked Respondent’s telephone number, deleted his messages and deleted his phone number. She told investigators she just wanted the relationship “to be done” but she knew that she would see him again, as they belonged to the same church (*Id.* at 5). Complainant asserted that she “didn’t want to deal with him,” so she blocked Respondent’s work, residence and mobile phone numbers (*Id.* at 6).

Complainant claimed that Respondent called her six times the previous evening from telephone number [REDACTED]. She further asserted that he “called [her] private” at approximately 1440 hours when he was already sitting outside her apartment. “Neighbor” was with her as she received the call, and suggested that Complainant go outside, and talk to him (Dept. Ex. 2A at 8). Complainant replied, “No, there’s nothing to talk about. I just want him to leave me alone.” Complainant stated that she heard her bell ringing, then went outside of her apartment and saw Respondent standing outside the building’s front door (*Id.* at 8, 10). Complainant stated that Respondent would call her “private” because she had blocked all his numbers (*Id.* at 9). According to Complainant, Respondent called her at 1440, 1441, 1442, 1443

hours (*Id.*). “Neighbor” told Complainant that she was going to go outside and talk to Respondent but Complainant grabbed her arm and told her, “No” (*Id.*).

Complainant and “Neighbor” returned to Complainant’s apartment and heard Respondent continue to ring the bell. Complainant eventually returned to the front door of the building and told Respondent, “Please stop ringing my door or go away. Go about your business, okay?” According to Complainant, Maurice Joiner, a mutual friend of Respondent and Complainant, then called her and said, “[Ernesto] wants his things.” Complainant replied, “What, what things? A bottle of Axe? That’s what he wants? . . . When I see him at church on Sunday, I can bring it. I can give it to you and you can give it to him. It shouldn’t be a big deal. Just please tell him to get away from my door before people start complaining and my kids get upset, you know” (Dept. Ex. 2A at 11).

Respondent kept ringing the doorbell but then stopped; Complainant opened the door to see if he was outside, and then placed the bottle of Axe on the doorknob in a plastic bag (*Id.* at 12). She then received another call from Joiner; she told him that she had placed Respondent’s “stuff” on the doorknob, “so that way we can’t see each other and we can just leave it at that.” Complainant and “Neighbor” walked outside again and saw Respondent sitting by the door. Complainant remarked to “Neighbor,” “This guy is crazy, he just doesn’t care. Like he doesn’t care about the law; he thinks because he’s a cop he can do what he wants.” Respondent continued ringing the doorbell, as Joiner, still on the telephone, told Complainant that Respondent wanted his shirt. Complainant told Joiner, “I’ll bring it to church. Okay? No problem . . . It’s not a big deal . . . it’s not as hard . . . it’s not his kidney. Tell him I’ll bring it to church” (*Id.* at 13).

Finally, Complainant told Respondent, “You want me to get people involved? I don’t think you want me to get people involved. I’m not playing with you; don’t come by my door again.” At that point, Respondent left but called Complainant some time later from a private number. Complainant answered and asked, “What’s the problem, Ernesto? Respondent replied, “Oh, you’re listening to that lying B. She’s a whore, she’s a hoe.” Complainant replied, “But she wasn’t a whore and a hoe when you was tricking and spending money, right? Listen, I don’t even care anymore. Just leave me alone.” According to Complainant, Respondent replied, “Okay, and then you block my number and didn’t want to talk to me.” Complainant replied, “I don’t want to talk to you because you’re a liar.” Respondent then called Complainant a coward and “all these B words” (Dept. Ex. 2A at 13-14).

Complainant later received a call from Joiner, whom she believed was inside Respondent’s car with him. Joiner told Complainant that Respondent had told him to come to his house because [Complainant] was going to “pull up” (*Id.* at 14). Complainant told Joiner that she had no means of going to Respondent’s home other than a cab or if someone provided her a ride; she then raised the issue of her children.” Joiner told Complainant that he just wanted to make sure “there’s no beef between [you] guys.” Complainant replied, “There’s no beef but he’s not going to sit on a phone and say what he wants to me and think he can get away with it” (*Id.*).

Complainant told investigators that her best friend picked her and her children up to visit a friend named “Jelo” (*Id.* at 16). They remained there for approximately 30 minutes before returning to Complainant’s apartment at approximately 1902 hours. When Complainant arrived at her building, she found Respondent sitting on the front steps. She was with her children and escorted them into the building, walking past Respondent (*Id.* at 17-18). Complainant opened her apartment door and brought her children inside, when she realized that Respondent had

followed her into the building (*Id.* at 18). A brief, contentious discussion ensued in which Complainant admitted that she cursed at Respondent (*Id.* at 18-19). “Neighbor” came out of her apartment and Complainant told her, “It’s okay, I’m okay” (Dept. Ex. 2A at 19). When Complainant asked Respondent again, “Why are you here?” Respondent grabbed her by the throat, as well as grabbing her left hand and right bicep to prevent her from striking him (*Id.* at 19-20, 22, 44). Complainant described the look on his face as “Like, angry face, just looking dumb” (*Id.* at 21). According to Complainant, Respondent released her and left the building when she screamed, “Get the fuck off me” (*Id.* at 25, 26-27). Complainant told investigators that once Respondent left, she sent a text message to Joiner, telling him that she was going to “get the cops involved” (*Id.* at 25).

Complainant stated that she saw the handle of Respondent’s firearm extend from beneath his shirt when she saw him in front of her house; he was wearing a baseball jersey, blue khaki shorts and a blue baseball cap (*Id.* at 29-30). After Respondent left the area, Complainant helped “Neighbor” with her radio, then called 911 (Dept. Ex. 2A at 32-33).

Complainant explained that after she had called 911, she had attempted to call back and cancel the request because, “I felt like nothing would be done or like nothing would happen. Because like I said, he told me a lot of stories to where -- it was different – like another girl, domestic violence and they came – the lieutenant came to the scene and they arrested him. But he really didn’t get into trouble” (*Id.* at 33-34). Complainant told investigators that after she had been brought to the 73rd Precinct to be interviewed, she received a text from Joiner, who asked her to call him; she replied “No” (*Id.* at 36). When Joiner replied, “Why?” Complainant countered, “Why should I call you?” Joiner replied that he wanted to speak to her and she relented. When she called Joiner, he asked her what happened and what was going on; she

replied that she had gotten the police involved (*Id.* at 37). Joiner replied that Complainant and Respondent “need to talk” (*Id.*).

Complainant related to investigators another instance of Respondent engaging in a physical altercation with her, which occurred approximately one month earlier. Complainant stated that when she told Respondent that her children’s father had written her a letter, he became upset. Respondent tried to raise the issue several days later but Complainant refused to discuss it. According to Complainant, Respondent grabbed her and pushed her. She said that, at first, she did not think much of it “[b]ut I had like thoughts of that it will happen to me. I have had thoughts because, you know, like I said, he told me things that he did in the past like over the girl. And he was suspended or something and he was arrested” (Dept. Ex. 2A at 38-39). Investigators asked Complainant how she felt when Respondent told her about his relationships with other women, she replied, “Well, that’s why I was scared. Because it was like, you know -- he’s a cop” (*Id.* at 40).

Maurice Joiner testified that he had been arrested by NYPD officers on five occasions and had been convicted of one misdemeanor, Criminal Impersonation (T. 238). He is licensed by the State of New York to perform security work and is employed by [REDACTED] (T. 225-226). Joiner testified further that he has been Respondent’s friend for several years and that they attend the same church (T. 227).

Joiner testified that on June 7, 2018, he was privy to a verbal disagreement between Respondent and Complainant, which occurred over the telephone (T. 228). Joiner claimed that during the telephone conversation, Complainant sent him several text messages, which included a statement of her desire to “mess up [Respondent’s] life” (T. 229; Resp. Ex. C). Joiner testified that these text messages were sent at around 1806 hours on June 7, 2018 (T. 232). According to

Joiner, at the time he received these messages, he was with Respondent in a vehicle (T. 235). He denied visiting Complainant's residence that day with Respondent (*Id.*). Joiner testified further that he accompanied Respondent to church that evening at 1900 hours (*Id.*). Joiner conceded on cross-examination that he was not with Respondent for the entire day on June 7 but "just a couple – just a couple [hours]. He was in the car and after this, the text was happening, we went to church" (T. 239). Joiner testified further that he never saw Respondent and Complainant in the same place together on June 7, 2018 (T. 236).

During his Department interview, Respondent denied that he had been involved in a domestic incident with Complainant (T. 126). According to Respondent, he was not at Complainant's apartment, the scene of the domestic incident, between 1900 and 1930 hours, the time she alleged the incident took place (T. 127, 129, 134). Respondent provided Sergeant Silverstein with notarized letters from members of his church who asserted that he had been at the church from 1900-2100 hours on June 7, 2018 (T. 127, 138). Respondent also provided Silverstein with printouts he claimed were from the GPS locator on his mobile phone, and argued that they established his location history for that day (*Id.*, 135). Respondent also told Silverstein that he had seen his friend Maurice (Joiner), who had been in contact with Complainant that day (T. 135).

Respondent testified that in June 2018, he was involved in a romantic relationship with Complainant and had been since March of that year (T. 260). On June 7, 2018, he attended a "moving up" ceremony for his son at [REDACTED] in [REDACTED], N.Y. at approximately 1100 hours (T. 261). According to Respondent, the ceremony lasted about 1½ -2 hours, after which he drove to his residence in [REDACTED] (T. 262). On the way home, he stopped at a

CVS Pharmacy to run an errand for his grandmother, and then dropped her at his residence at about 1400 hours (T. 262-263).

Respondent testified that once he dropped off his grandmother, he made an unsuccessful attempt to contact Complainant by telephone (T. 263). He then contacted Joiner by telephone at approximately 1430 hours and asked him to contact Complainant, as she had blocked his number due to an argument they had the night before (T. 262-264). According to Respondent, the dispute was about a former girlfriend of Respondent's, of whom Complainant had become aware (T. 347-348). Respondent testified that after he met up with Joiner, Joiner sent text messages to Complainant while they drove together to Complainant's residence (T. 264-265). Respondent admitted on cross-examination that he initially thought he would allow Complainant time to "cool off" because she had blocked his number on previous occasions when she became upset; by the time he was on his way to her residence, however, he was annoyed with her (T. 348).

According to Respondent, he never saw Complainant at her residence but Joiner was able to exchange text messages with her (T. 265, 293). Respondent claimed that he asked Joiner to communicate to Complainant that he wished to terminate their relationship and to retrieve some personal items, consisting of body wash deodorant and other toiletries, which he had left at her residence (T. 264-265, 373). Joiner advised Respondent that Complainant had agreed to leave his personal items in a plastic bag outside her front door (T. 266). Respondent testified that he eventually retrieved a bag containing personal items from Complainant's door handle but that a t-shirt and a pair of boxer shorts were missing (T. 266-267). Respondent claimed that he left Complainant's residence at about 1500 hours and returned to his own residence (T. 267). On cross-examination, he conceded that according to the GPS data from his mobile telephone, he spent approximately 35 minutes at Complainant's residence from 1433 hours to 1508 hours (T.

341, 343). Respondent reiterated that he did not see Complainant at any time on June 7 (T. 346). He acknowledged that Joiner had a car but that he has never ridden in it (T. 347). He denied leaving his mobile telephone at home on June 7th and traveling to another location and further denied that he turned his locations services off at any time that day (T. 344-345, 373).

According to Respondent, he remained at home until 1855 hours, when he left to attend choir rehearsal at his church⁵ (T. 267-268, 344). Respondent testified that it took approximately ten minutes to drive to the church and that he arrived at approximately 1905 hours, remaining there until 2119 hours (T. 268). He recalled that he saw his pastor, Reverend Grady Zellars, as he walked into the building. Respondent asserted that he remained in the church to assist in locking the building before returning home. According to Respondent, when he returned to his residence, he found his boxer shorts and t-shirt outside his building soiled with urine (T. 268-269, 270; Resp. Ex. H). He remained at home until he was contacted by his delegate at approximately 2330 hours and told to report to the 73rd Precinct (T. 269-270).

Respondent offered in evidence purported GPS records from his mobile phone, which he contended corroborated his testimony regarding his physical movements on June 7, 2018 (Resp. Ex. J). He also offered two photographs of what he contended was Complainant's residence, claiming that none of Complainant's apartment windows look out onto the street (Resp. Exs. I-1, I-2).

Grady Zellars testified that he is the pastor of Respondent's church and has known Respondent since he was approximately 10 years old (T. 154). Zellars testified further that Respondent is a musician who plays for the church and that he was present at the church on June

⁵ It should be noted that this testimony appears to be in conflict with Joiner's testimony that he was in a car with Respondent at 1806 hours.

7, 2018 for a choir practice from 1900-2100 hours (T. 155, 157-158). Zellars asserted that Respondent arrived on time that day and that the choir regularly rehearses on Wednesdays and Thursdays between those hours (T. 158). He testified further that Respondent did not leave the church any time during that period “because you don’t leave during rehearsal” (T. 159). Zellars conceded that he did not know where Respondent was prior to his arrival at the church that evening (T. 162).

When the Tribunal asked Zellars whether he had a specific recollection of Respondent being present at the practice or that he simply expected Respondent to be present, he responded, “No, I was there personally. I was in the church for rehearsal” (T. 162-163).

Gloria Miles testified that she has known Respondent since he was approximately five years old and that he was her church’s drummer, pianist and organist (T. 207). Ms. Miles testified further that on June 7, 2018, she was at choir practice with Respondent and recalled doing so because he was attempting to teach the choir a song and she, along with several other members of the choir, did not know the words. Ms. Miles recalled that she had to make copies of the song for distribution to the members who did not know the lyrics (T. 208-209). According to Ms. Miles, choir practice generally began at 1900 hours and ended, depending on circumstances, at 2100, 2200 or 2230 (T. 208).

On cross-examination, Ms. Miles conceded that she did not know where Respondent had been just before he arrived at choir practice on June 7, 2018 (T. 209-210).

Specification 1: Engaging in a Physical Altercation

I find that the Department has met its burden by a preponderance of the credible, relevant evidence that Respondent engaged in a physical altercation with Complainant.

I find Complainant's hearsay statement of how and why her relationship with Respondent reached an inflection point on or about June 7, 2018, credible. In sum, she came to believe that Respondent was not being candid with her with respect to his continued association with other women while they were involved with each other. I find her decision to block his telephone numbers in an attempt to cut off further communication with him, in effect terminating the relationship, logical and comporting with common sense. It is more likely than not that Complainant was the one who terminated the relationship, rather than Respondent, who testified that he terminated the relationship based upon Complainant's supposed petulance. Moreover, Complainant's description of Respondent volunteering to her that a former girlfriend had called him, then attempting to discredit that woman as a liar when she made unflattering statements about him to Complainant, seems consistent with his dismissive characterization of Complainant's actions and motivation.

I further find credible Complainant's description of Respondent's efforts to retrieve personal items of nominal value, as petty and likely motivated by Respondent's pique at being rejected, rather than a rational desire to reclaim personal property at the end of a relationship. I further find that his description of his efforts to secure the return of his property, most notably, his body wash, appear tailored to portray him as a victim. I had the opportunity to observe his demeanor, albeit, remotely, as he testified on this matter. He appeared almost indignant over the disposition of his toiletry items, a response I found disproportionate to their value. I also find that his decision to involve Maurice Joiner in this attempted replevin was an attempt to rehabilitate his reputation by enlisting his friend as a witness to Complainant's purported unreasonableness. I further find his narrative, rather than reflecting poorly on Complainant's credibility, revealed Respondent's state of mind, that being a desire to retaliate for her ending the

relationship. This state of mind further informs the Tribunal's negative assessment of Respondent's credibility.

Complainant's description of the alleged assault also seems straightforward and logical. While the physical contact, as she described it, was brief, it was violent enough to cause her to scream and attempt to defend herself. The photograph of Complainant's neck injury in Department Exhibit 5 provides corroboration of her hearsay statement. Respondent's flight, when Complainant's scream made the possibility of being discovered a distinct probability, was also logical.

Based upon the post-incident investigation, the assault occurred somewhere between Complainant's self-reported return to her home at 1902 hours and her call to 911 at 2020 hours. In her 911 call, she reported a domestic incident at her residence. When police officers responded to her home, she confirmed that she had called 911 and volunteered that she had made a second call in an attempt to cancel the 911 request for police services. During the interview at her apartment, Complainant told Police Officer Fitton that she had been involved in a domestic incident. After Police Officer Gosik took her to a different room, Complainant told her that Respondent had grabbed her by the neck. When she was taken to the 73rd Precinct for a formal interview, Complainant repeated her charge that Respondent had grabbed her around her neck, as well as grabbing her arm.

I find Complainant's initial reports, as described above, were close in time to each other, as well as the alleged assault, and factually consistent with each other. There is also a photograph of a neck bruise taken by police officers, which is evidence of corroboration. I further find that the statements Complainant made at her apartment were made close in time to the reported startling event (*i.e.*, being grabbed around her throat) and under the effect of such an

event (*i.e.*, Police Officer Gosik's report of Complainant being "standoffish" and later crying). Based upon these three factors, I find her report of Respondent's assault upon her credible.

I also find Complainant's decision not to participate in these proceedings is insufficient to discount the veracity of her claim, rather than a concession that her statements were untruthful. I further find that she had a basis for that doubt, namely, Respondent's revelation to her that he had been previously arrested on a domestic violence allegation. Complainant told Sergeant LoMonaco in her interview on June 7, 2018, that Respondent's status as a Member of Service, his revelations of his behavior in past relationships with women, and a previous instance of him becoming physical with her made her afraid.

Respondent offered evidence of a text message exchange between Joiner and Complainant, which Joiner testified occurred at approximately 1806 hours on June 7, 2018, saying that she was going to "violate him" (Resp. Ex. C, p. 2 of 17). Respondent argued that the aforementioned text message was evidence of Complainant's willingness to fabricate an accusation against him. The content of the text message, taken by itself, need not be probative of lack of veracity. Taken in context, the evidence supports a finding that on June 7, 2018, Complainant and Respondent's relationship had degraded into acrimony. It is also unclear whether the statement, "I'm going to violate him" referred to a future intention to make an accusation without factual support or to report an earlier instance of physical altercation which occurred approximately one month earlier.

It is also troubling that the exhibit was authenticated by Maurice Joiner; a witness who the evidence strongly suggests is biased in favor of Respondent. Joiner has also been convicted of a crime of deception, casting further doubt upon his veracity. Second, the incomplete and unclear nature of the exhibit precludes reliance upon it for the purposes Respondent advances.

A closer examination of Respondent's Exhibit C reveals that the time above the statement in question is visible but no date appears; thus, the only evidence that this text was sent on June 7, 2018, at 1806 hours, is Joiner's testimony. The time stamp at the top of the page reads "11:47." The legend appears to reflect a saved contact under "[Complainant]." The document appears to be 15 pages long, beginning with the pagination "2 of 17" continuing on to "16 of 17." Based upon the foregoing, the document is clearly incomplete, as pages 1 and 17 are missing. In addition, the time stamp in the body of the text message string appearing on page 2 of 17 is a light gray color, as it appears on the photocopy, which is not of high resolution, and may just as well be "Today 8:06 PM⁶," as well as "Today 6:06 PM." It should also be noted pages "9 of 17," "11 of 17" and "14 of 17" are blank. Finally, the message string continues until page 16 of 17, before there is another time stamp of "Today 9:31 PM."

For all the reasons set forth above, I find Respondent's Exhibit C to have no probative value.

Respondent's testimony, taken in its best light, was self-serving, inaccurate and tailored to deflect from his violent act. I reject his testimony that he was forced to end a relationship of two to three months with a petulant Complainant who blocked his number without sufficient justification, and then fabricated a report of an assault. His description of his afternoon meeting with Complainant is dubious and is consistent with his overall attempt to reframe himself as the victim, as opposed to Complainant. I also take into consideration my findings with respect to Specifications 1, 2, 3 and 4 of Disciplinary Case No. 2020-21688. The misconduct of which

⁶ It should be noted that if the time stamp actually does reflect the time 8:06 PM, it would be consistent with Complainant sending text messages after the alleged assault.

Respondent has been found Guilty casts further doubt on his forthrightness and his willingness to comply with Department rules, permitting a negative inference regarding his veracity.

Respondent claimed that he was at choir rehearsal at the time of the assault and offered evidence from three alibi witnesses, Grady Zellars, Gloria Miles and Joiner. He also offered evidence, which he proffered was GPS tracking information from his mobile telephone (Resp. Ex. J). I found this evidence to be unconvincing.

While I do not have serious doubts about the testimony of Ms. Miles and Mr. Zellars that Respondent appeared for choir rehearsal that evening, it is unlikely that they would remember with specificity the time of his arrival on June 7, 2018, which was almost three years ago. Since choir practice was regularly scheduled to begin at 1900 hours, it is more likely than not, that they assumed Respondent arrived at 1900 hours as a matter of habit, rather than a specific recollection of the event. I also find that Joiner's relationship with Respondent strongly suggests a bias in favor of Respondent, causing serious doubt whether he would be forthcoming with facts that were not helpful to him.

The evidence offered by Respondent and characterized as GPS tracking information, taken at face value, appears to corroborate his view of the events; the issue with this evidence is that, in the absence of additional evidence of authentication or expert testimony, it carries minimal weight. The documents were not certified as business records of Respondent's wireless carrier. There is also no evidence of how this data was collected and by whom. If this evidence were deemed reliable, it would tend to support his narrative that he drove to [REDACTED] [REDACTED] the morning of June 7, and then returned to [REDACTED] at about 1423 hours. It would also support his testimony that he then drove from his home to Complainant's apartment and spent from 1433-1508 hours at that location. Respondent's interpretation of the evidence

would also support his claim that he then returned to his home and remained there until 1855 hours. Finally, the evidence would support Respondent's claim that he traveled from his home to [REDACTED] Church at 1855 hours, arriving at the church at 1904 hours and remaining there until 2119 hours (*Id.*).

There is no evidence, however, of how accurate the graphic depiction in Respondent's Exhibit J comports with reality, nor is there evidence of how external human factors may permit an observer to misapprehend the import of the evidence. While the Tribunal took judicial notice that most mobile telephones have GPS capability, it is undisputed that "location services" on those telephones may be turned on, and off, by anyone with access to the phone. Although Respondent testified that he never turned off the "location services" feature on his mobile telephone off and that he did not know how to do so, this assertion lacked credibility. The Tribunal has further reason to question the reliability of this evidence based upon Respondent's proffer of its probative value as it pertains to the events of June 7, 2018, and not with respect to the events of June 12, 2018. As discussed below in the analysis of Disciplinary Case No. 2018-19143, Respondent appears to have treated the exonerative capability of his mobile telephone, which he asserted he possessed on both dates, in one manner with respect to June 7 and another manner with respect to June 12.

Given the issues described above with Respondent's veracity, the Tribunal will not rely on his assurances that the exhibit is probative of the facts as Respondent proffers them. In the absence of credible testimony setting forth the ability to turn location services off at the discretion of the telephone user and whether such action may be discerned from a printout of tracking results at a later time, the Tribunal does not find Respondent's Exhibit J to have any persuasive probative value.

Respondent's Exhibit E depicts Respondent's landline telephone and purports to show the number "[REDACTED]" and "[Complainant]" in the caller ID. These calls purportedly registered on his telephone at "4:07" and "4:57" on June 7; the time of the last call on June 7 is unclear. This evidence does not appear to have any probative value with respect to whether or not Respondent assaulted Complainant on June 7.

Finally, Respondent testified that Complainant left a t-shirt and shorts in front of his apartment building on June 7, 2018, which had been soiled with urine (Respondent's Exhibit H). Putting aside the inflammatory nature of this allegation, the exhibit has no probative value with respect to whether or not Respondent assaulted Complainant that evening.

Based upon the foregoing, I find Respondent Guilty of Specification 1.

Specification 2: Failure to Remain at the Scene

I find that the Department has met its burden by a preponderance of the credible, relevant evidence that Respondent failed to remain at the scene of an off-duty incident.

Patrol Guide procedure 212-32 requires all off-duty Uniformed Members of the Service, when at the scene of an unusual occurrence, and where the UMOS is a participant or a witness, to remain at the scene and to request the response of the Patrol Supervisor in the precinct of occurrence (P.G. 212-32). The Patrol Guide clarifies the term "unusual occurrence" as including "family disputes or other incidents of domestic violence" (*Id.*).

I note that I have already found, by a preponderance of the evidence, that Respondent and Complainant were involved in an off-duty incident on June 7, 2018 at her residence, which involved domestic violence. There is no dispute that Respondent was not present when police arrived in response to her 911 call. There is also no evidence that Respondent requested the

response of the Patrol Supervisor in the precinct of occurrence, although Lieutenant Sperrazza, the 73rd Precinct Third Platoon commander, did respond to Complainant's residence.

I therefore find Respondent Guilty of Specification 2.

Disciplinary Case No. 2018-19143: Violation of Order of Protection

Sergeant LoMonaco testified that on June 12, 2018, domestic violence officers from the 73rd Precinct went to Complainant's residence for a follow-up visit (T. 68). When they met Complainant, she claimed that Respondent had been at her residence earlier in the day and that he had, in so doing, violated an order of protection (T. 69). Sergeant LoMonaco re-interviewed Complainant, who claimed that she looked out a window in her residence and saw a vehicle that she deemed "suspicious" and possibly linked to Respondent (T. 70). She then asked her friend, Witness #2, to go outside and see if she could identify the person inside the vehicle; Complainant claimed that she showed Witness #2 a picture of Respondent which was on her telephone (T. 71, 74-75, 99). Witness #2 then stepped from Complainant's residence and approached the vehicle; before she reached it, an individual stepped from the vehicle and walked toward Complainant's residence. Witness #2 then started walking back toward Complainant's residence; apparently, the individual saw her and retreated to the vehicle before entering it (T. 71-72). Complainant claimed that the person who stepped from the vehicle and approached her residence was Respondent (T. 72, 98). Complainant's second hearsay statement was admitted into evidence as Department Exhibit 3A.

Sergeant LoMonaco interviewed Witness #2 on June 12, 2018; her hearsay statement was admitted into evidence as Department Exhibit 4A. Witness #2 confirmed that she was present at Complainant's residence at approximately 0130 hours on June 12, 2018, when Complainant asked her to go outside to identify someone in a car (T. 74; Dept. Ex. 4A at 3). According to

Witness #2, Complainant had become nervous and went to check a window; she told Witness #2 that she was concerned because she had an incident with her “ex-boyfriend Ernesto” (*Id.* at 4). Witness #2 did so and observed a car on the corner of [REDACTED] Street and [REDACTED] [REDACTED] the car was double-parked in front of Complainant’s residence, as if it had come from the direction of [REDACTED] Street⁷ (*Id.* at 7, 9). She saw two men in the car, one an older Latino and the other Black (*Id.* at 9). Witness #2 walked past the car on [REDACTED] Street, in the direction of [REDACTED] Street, as if she were going to a store; approximately five minutes later, she returned on [REDACTED] Street and observed the Black male walking toward Complainant’s residence, then reversing direction and walking toward [REDACTED] (*Id.* at 16). Witness #2 described the man she saw as wearing “a black fitted hat, a black t-shirt and black pants and black – he got on black everything. And he had his phone in his hand” (Dept. Ex. 4A at 12). She later described the shirt as having short sleeves (*Id.* at 13). According to Witness #2, when she returned to Complainant’s apartment, Complainant told her, “That’s him” (*Id.* at 16). Witness #2 stated that she and Complainant watched from a window and saw the Black male enter the car and leave (*Id.* at 19).

Witness #2 stated that shortly thereafter, Complainant received a call from someone asking for “Ernesto Rodriguez” (*Id.* at 25). Complainant called the number back and was forward to a voicemail recording for [Acme] Security for [Gryffindor]⁸; Complainant told Witness #2 that was the building complex Respondent lived in (*Id.* at 25, 26).

Respondent testified that between June 7 and June 12, he had no contact with Complainant but he saw her on June 12 in front of his apartment building (T. 296-297).

⁷ I take judicial notice that Complainant’s residence is located on [REDACTED] Street, between [REDACTED] and [REDACTED] Street.

⁸ “Acme” and “Gryffindor” are pseudonyms for the security company for Respondent’s residence complex and the residence complex, respectively.

Respondent claimed that, at the time he saw Complainant, he was in his apartment on the [REDACTED] floor (T. 297). According to Respondent, he received a telephone call from an unknown number at approximately 0130 hours; he claimed that because he had observed damage to his personal vehicle the night before, he went to his balcony to check on his car (T. 297-298). As he looked down to the sidewalk level, he asserted he that “through the tree line, I could see someone pacing back and forth” and thought the person “looked like [Complainant]” but [he] “wasn’t 100% sure” (T. 298). He then dressed and went down to the ground floor to investigate; when he reached the front of his building, “[Complainant] saw [him] and took off running” (T. 298). Respondent claimed that he was “absolutely sure” that it was Complainant he saw running away from his building (*Id.*).

According to Respondent, he then informed the head of security at his building that “the female who I believe keyed my car the night before is over here in the area” (T. 299).

Respondent and the head of security entered a vehicle and drove around the parking lot, where Respondent claimed he saw Complainant “run between two cars where she was hiding, into a vehicle that [he]. . . got the plate for, and that vehicle took off, and went down Linden Boulevard, and was gone” (*Id.*, 350-351). Respondent then returned to his residence with the head of security and called 911, informing the operator that “a female who has an order of protection against me is at my residence” (*Id.*).

When police officers responded to Respondent’s residence, he identified himself as a Member of Service and informed them of what he had observed. According to Respondent, as the responding officers were taking down information, he was receiving harassing telephone calls on his mobile telephone (T. 301). Respondent offered in evidence copies of his mobile telephone records which he asserted supported his assertion that he received 30 telephone calls,

between 0206 hours and 0240 hours, from a phone with no caller ID displayed (T. 303-306; Resp. Ex. F). Respondent also offered evidence to support his assertion that calls were coming in on June 7 to his landline telephone inside his apartment (T. 308-309; Resp. Ex. E).

On June 12, Respondent was directed to report to the 73rd Precinct [REDACTED]
[REDACTED] Respondent denied violating the order of protection; he specifically denied either going to Complainant's home or contacting her on that date (T. 312, 353). He claimed that from 0100 hours to 0130 hours on June 12, he was inside his apartment (T. 356).

Respondent offered in evidence an order of protection against Complainant, which he contended he obtained on June 12th [REDACTED]
[REDACTED]. He also offered evidence of a text message he received on his mobile telephone on June 20 from telephone number [REDACTED] [REDACTED] (T. 316-318; Resp. Ex. D). Respondent testified that he believed the message came from Complainant; he replied, "Leave me alone" (T. 318; Resp. Ex. D).

Respondent also offered in evidence seven video recordings obtained from the security cameras in his apartment building, depicting certain movements he made on June 12, 2018 (T. 320-323; Resp. Ex. A-1, A-2, A-3, A-4, A-5, A-6, A-7). On cross-examination, he asserted that a check of the GPS records from his mobile telephone on June 12 would show that he never went to Complainant's residence: "Absolutely. It shows that I got back to my residence around – because I had told you, I went and filed for my order of protection that day, and I did some

errands for my grandmother. I got back to the house at [1645 hours] and I never left”⁹ (T. 349-350).

Specification 1: Violation of Order of Protection

I find that the Department has met its burden by a preponderance of the credible, relevant evidence that Respondent violated an order of protection in favor of Complainant on June 12, 2018.

I find that Complainant made a credible statement to police officers on June 12, 2018 that she had seen Respondent near her apartment that morning. She identified a witness, Witness #2, who was interviewed by investigators. Witness #2 confirmed that she was with Complainant at approximately 0130 hours when she identified the person she saw near her apartment as Respondent and that the person was wearing a black fitted cap, black t-shirt and black pants.

Respondent’s assertion that Complainant’s apartment is in the rear of her building and does not face [REDACTED] Avenue has no probative value, as the layout of Complainant’s apartment is not in evidence (*see* Respondent’s Exhibits I-1 and I-2). Respondent’s assertion that he was in his apartment at 0130 hours has no independent support and rests upon his self-serving statement. None of the security video evidence that Respondent obtained from his apartment building refutes Complainant’s allegation that he was near her apartment at 0130 hours:

- a. Respondent’s Exhibit A-1, depicting him in an elevator, has no time stamp;
- b. Respondent’s Exhibit A-2, depicting him walking through the doors to his apartment building, has a time stamp reflecting 0151 hours;
- c. Respondent’s Exhibit A-3, depicting him walking through a parking lot, has a time stamp reflecting 0205 hours;

⁹ While Respondent’s answer referred to records not in evidence, the Tribunal permitted the response to remain in the record in deference to his right to present a defense.

- d. Respondent's Exhibit A-4, depicting a parking lot, has a time stamp reflecting 0156 hours;
- e. Respondent's Exhibit A-5, depicting him walking through the lobby of his apartment building, has a time stamp reflecting 0209 hours;
- f. Respondent's Exhibit A-6, depicting police officers walking through the lobby of his apartment building, has a time stamp reflecting 0218 hours;
- g. Respondent's Exhibit A-7, depicting police officers and a sergeant walking through the lobby of his apartment building, has a time stamp reflecting 0225 hours.

I do note, however, that Respondent's exhibits A-1, A-2 and A-5 all depict Respondent wearing a dark cap, dark t-shirt and dark pants, generally consistent with Witness #2's description of the man she saw outside Complainant's apartment building¹⁰.

Similarly, Respondent's assertion that he received numerous "harassing" telephone calls from an unknown number has no bearing on Complainant's allegation that he was outside her apartment at 0130 hours, rather than at his home, as he contends. Respondent's Exhibit F depicts a series of calls from a "No Caller ID" number beginning at 0239 hours, one hour after the alleged incident occurred.

The evidence of an order of protection Respondent obtained against Complainant on June 12, 2018, is inapposite. It merely contains assertions Respondent made during his trial testimony, most of which deal with conduct he alleged Complainant committed at 0145 hours, after the time which she alleged that he appeared near her apartment. Similarly, evidence offered to suggest Complainant sent Respondent a text message on June 20, 2018, is irrelevant to the allegation that Respondent engaged in misconduct on June 12, 2018.

On cross-examination, Respondent was asked the following questions and gave the following responses:

- Q. Now let's go to the violation of the order of protection. Did you have your phone with you that day?
- A. Yes, I did.

¹⁰ The security video footage is in black and white.

Q. On June 12th?

A. Yes, I did.

Q. Did you provide your GPS records to the [REDACTED] office when you made your proffer about the order of protection?

A. I did, and I also provided it to Brooklyn North – Brooklyn South Inspections.

Q. If we look at your GPS records, it would indicate that you didn't go over to her house that night, on June 12, 2018?

A. Absolutely. It shows that I got back to my residence around – because I had told you, I went and filed for my order of protection that day, and I did some errands for my grandmother. I got back to the house at 4:45 and never left.

(T. 349-350).

Under New York law, “evidence of post-crime conduct that may in the context of a particular case evince a [respondent’s] consciousness of guilt of the offense with which [the respondent] is charged is admissible. A false alibi or explanation for one’s actions, intimidation of a witness, destruction or concealment of evidence, or flight may be evidence of ‘consciousness of guilt.’ A [respondent] may introduce evidence of an innocent explanation for the conduct to rebut the inference of ‘consciousness of guilt.’ A jury should be advised of the limited probative value of ‘consciousness of guilt’ evidence and must be so advised upon request of the [respondent]” (*NY Criminal Jury Instructions 4.20.1*; see *People v. Bennet*, 79 NY2d 464, 469-470 [1992]). The Court of Appeals refined its evaluation of the principle, ruling that its probative weight is “highly dependent upon the facts of each particular case” (*People v. Cintron*, 95 NY2d 329, 332-333 [2000]; see *Criminal Jury Instructions 2nd*, General Applicability, Consciousness of Guilt).

The burden of proof never shifts to a Respondent in a disciplinary proceeding (see *Disciplinary Case No. 2017-18159* [March 4, 2020]; *Disciplinary Case No. 2014-12709* [March 18, 2016]). In making a credibility determination, however, Respondent’s assertion that his

mobile phone's GPS records would, in effect, exonerate him of the misconduct charged in this specification raises the question of why he would not have produced such records, if they had the probative value he claimed. He clearly was aware of the potential evidentiary value of such records, since he offered them in defense of the charge of strangulation, arguing that they established he was somewhere other than Complainant's apartment at the time she alleged the assault to have occurred. There is no evidence that he lost access to the records; in fact, he asserted that he provided them to investigators from Brooklyn South Investigations, [REDACTED]. If every one of Respondent's factual assertions set forth above were true, his failure to introduce the records is baffling.

Based upon this logical inconsistency, it is more likely than not that the records would not have exonerated Respondent, as he proffered; that he was aware that they would not exonerate him; and that he made his assertion that they would in the hope it would be accepted by the finder of fact at face value. Under the circumstances that Respondent made this statement, I find that it is a false exculpatory statement. Based upon Respondent's incentive to produce such records once he asserted that they existed and had an exonerative impact, I find that his failure to produce them evinces consciousness of guilt.

Based upon Complainant's credible assertion that Respondent was outside her apartment building at 0130 hours on June 12, 2018, I find that he was at that location and that his presence was in violation of the order of protection issued by [REDACTED] on June 9, 2018.

Accordingly, I find him Guilty of Specification 1.

Disciplinary Case No. 2020-21688: Criminal Association

Sergeant Steven Silverstein testified that he is an investigator with the Brooklyn South Investigations Unit (T. 115-116). On November 16, 2018, he interviewed Respondent in connection with the allegation that he violated the order of protection issued in favor of Complainant (T. 122; Dept. Ex. 9). Prior to the interview, Silverstein received a call from a member of Internal Affairs Bureau Group 32, who passed on information suggesting that Respondent was associating with Maurice Joiner, a person who had “a criminal past” (T. 123). Silverstein was asked to order Respondent not to associate with Joiner (*Id.*).

During Respondent’s Department interview, Silverstein asked Respondent “if he was aware of Mr. Joiner’s criminal history and . . . arrests”; Respondent indicated that he was not (T. 124-125). Silverstein informed Respondent that one of Joiner’s prior arrests was for criminal impersonation of a police officer and instructed him not to associate with Joiner in the future (T. 125, 137, 140). According to Silverstein, Respondent acknowledged receipt of the instruction he gave (*Id.*).

Lieutenant John Orecchia testified that he is an investigator assigned to the Internal Affairs Bureau (T. 167-168). He was the supervisory investigator into Complainant’s allegation that Respondent was associating with Maurice Joiner (T. 169). Orecchia leaned through his research of criminal indices that Joiner had been arrested [REDACTED] for criminal impersonation of a police officer, once for criminal possession of a firearm, and had a total of [REDACTED] arrests (T. 170, 195, 199). Complainant claimed that Respondent and Joiner were friends and that Joiner sometimes acted as an intermediary when she and Respondent experienced relationship troubles (*Id.*, 213-214). Orecchia contacted Sergeant Silverstein of Brooklyn South Investigations, passed along the results of his research and suggested that Silverstein instruct Respondent to stop

associating with Joiner (T. 174). Silverstein later provided an audio recording of Respondent's official Department interview on November 16, 2018, in which Respondent was asked whether he was aware of Joiner's criminal history; Respondent stated that he was not.

According to Orecchia, a surveillance team observed Respondent in Joiner's company on three subsequent occasions: January 22, 2019; January 29, 2019; and February 22, 2019 (T. 172-173, 175).

On January 22nd and 29th, Respondent left work at Manhattan Central Booking and drove to the [REDACTED] Bar and Grill. On January 22, the surveillance team observed Respondent enter the location, having a drink and talking to Joiner (T. 172-173, 190). On January 29, the surveillance team observed Respondent leave Manhattan Central Booking, drive to the location and enter, before leaving the location with Joiner. Respondent and Joiner then drove separately to [REDACTED] Road before parking their cars and entering a location. On February 22, 2019, the surveillance team observed Respondent and Joiner in front of [REDACTED], where Joiner was employed as a security guard. After having a conversation with Joiner, Respondent entered the location (*Id.*).

Orecchia testified that he conducted a computer audit of Respondent's database usage and learned that Respondent conducted inquiries of Maurice Joiner on the "On Point" and "DAS Lite" databases (T. 176). The "On Point" system collects complaint numbers and arrest numbers; the "DAS Lite" system collects general background information on individuals (*Id.*).

Orecchia testified further that according to his audit, Respondent conducted eight inquiries overall between May 8, 2018 and June 1, 2019, which were unrelated to Department business (T. 176-177, 196-197). Respondent made one inquiry regarding Joiner on May 18, 2018, at 2251 hours, and examined an arrest report pertaining to one of Joiner's arrests for criminal

impersonation of a police officer (T. 202). This inquiry was made prior to Respondent's November 16, 2018, Department interview (T. 177). Orecchia conceded on cross-examination that he never conducted a more thorough inquiry to determine whether Joiner had ever been convicted of a crime (T. 185-186, 195). Orecchia testified that Respondent also conducted database searches on Complainant (T. 196).

Maurice Joiner testified that he never asked Respondent to conduct a criminal record search on his name; he further denied ever asking Respondent to meet him at the clubs where he performs security duties (T. 236-237). Joiner conceded that while he occasionally saw Respondent at these clubs, it was a matter of happenstance and not preplanned (*Id.*).

Respondent testified that it was only after [REDACTED] June 8, 2018, that he learned Maurice Joiner had been arrested [REDACTED] times (T. 324). He admitted checking Joiner's name in Department databases, but claimed that he did so at Joiner's request to determine whether or not he (Joiner) had been "suspended" (T. 324-325). Respondent further admitted that he made these records checks without first obtaining permission from his supervisor (T. 325). When he was asked on cross-examination whether he had accessed, as the audit suggested, Joiner's arrest report for police impersonation, he first replied, "It's – it's possible," then later stated, "Yeah, I believe so. I'm not sure" (T. 330). He claimed that he had no reason to believe that Joiner may have been involved in criminal activity because, "I had no, like I said, no reason to believe that based on the fact, like I said, he's been arrested and I've been arrested. So, I just thought, he's been arrested" (T. 337). When asked if, after he viewed Joiner's "OMNI report" on May 18, 2018, he felt that he was on notice that Joiner had been arrested, he replied, "From what I understood it, from that, I thought it was a conviction of a felony" (T. 362). Respondent

also admitted that he also conducted checks on Complainant using Department databases (T. 329).

Respondent acknowledged receiving an order from Sergeant Silverstein during his Department interview to terminate his association with Joiner (T. 325, 360-361). In response to questions posed by the Tribunal, Respondent testified that he interpreted Silverstein's order to mean, "Don't call him, don't text him, and don't, like make initiations to meet with him, and I didn't do any of that" (T. 365). When the Tribunal asked whether he thought the limitations of the order included not to be anywhere Joiner was, Respondent answered, "No, because I can't control where he goes. Like it's not an order of protection or something that I have to leave or he can't stay" (*Id.*). He testified further that when Silverstein referred to a "criminal history," Respondent thought that meant arrests and convictions (T. 369). Respondent conceded that he made a records check of Joiner's name after Silverstein issued his order but disputed that he did not take it at face value, testifying, "I just think I misunderstood it" (T. 370).

He testified that Joiner attempted to contact him by telephone after he had received Silverstein's order but that he "ignored most of his messages" (T. 325-326). Respondent admitted further that he saw Joiner on approximately three occasions after he received Silverstein's order, at a sports bar and a night club, but that none of the meetings were pre-arranged (T. 326-327, 333, 334-336).

Specification 1: Criminal Association

I find that the Department has met its burden by a preponderance of the credible, relevant evidence that between November 16, 2018 and February 22, 2019, Respondent wrongfully associated with Maurice Joiner, a person reasonably believed to be engaged in, likely to engage in, or to have engaged in criminal activities.

Patrol Guide procedure 203-10 prohibits Members of Service from “[k]nowingly associat[ing] with any person or organization reasonable believed to be engaged in, likely to engage in, or to have engaged in criminal activities” (P.G. 203-10[2][c]).

Respondent admitted during his trial testimony that he was directed by Sergeant Steven Silverstein on November to stop associating with Maurice Joiner because he “had a record” (T. 325, 360-361). He further admitted that he made a records check of Joiner’s name after Silverstein issued his order on (T. 370). Lieutenant Orecchia testified credibly that an audit of Respondent’s database searches revealed that on May 18, 2018, at 2251 hours, Respondent accessed an arrest report pertaining to one of Joiner’s arrests for criminal impersonation of a police officer (T. 202). Orecchia’s testimony further established that on three occasions between January 22, 2019 and February 22, 2019, Respondent was seen in the company of Maurice Joiner by investigators conducting surveillance (T. 172-173, 175). Respondent admitted to seeing Joiner on those occasions inside sports bars and nightclubs (T. 326-327, 333, 334-336).

Based upon his admissions and Orecchia’s credible testimony, I find that Respondent “associated” with Maurice Joiner within the meaning of Patrol Guide procedure 203-10(2)(c). I further find that: (1) Respondent’s search of Joiner’s criminal history on May 18, 2018, including a review of an arrest report detailing Joiner’s arrest for criminal impersonation; (2) the details of Silverstein’s order on November 16, 2018, which directed Respondent to stay away from Joiner because he had a criminal history; and (3) Respondent’s admission that he accessed Joiner’s records after Silverstein issued his November 16, 2018 order provided sufficient actual notice from which he should have known Joiner was a person reasonably believed to have engaged in or likely to engage in criminal activities.

I do not find persuasive Respondent's assertion that he misunderstood Silverstein's order. At the time of his Department interview, Respondent was a 10-year Member of Service who had also studied for the sergeant's promotional examination. I find that common sense and the unambiguous language of Patrol Guide 203-10(2)(c) would inform the average, reasonable police officer that its prohibition on criminal association was not limited to persons who had been convicted of a felony.

Accordingly, I find him Guilty of Specification 1.

Specification 2: Inaccurate and Misleading Statements

I find that the Department has met its burden by a preponderance of the credible, relevant evidence that Respondent made inaccurate and misleading statements during his official Department interview on November 16, 2018.

During his Department interview, Respondent asserted that he was unaware of Maurice Joiner's criminal history and arrests (T. 124-125). The credible evidence established that Respondent made criminal records searches in two Department databases under Joiner's name and specifically accessed a record on May 18, 2018, which detailed Joiner's arrest for criminal impersonation (T. 202). Inasmuch as Respondent conducted his records check almost six-months prior to his Department interview, his assertion that he was unaware of Joiner's criminal history was misleading.

Accordingly, I find him Guilty of Specification 2.

Specification 3: Failure to Comply with Lawful Order

I find that the Department has met its burden by a preponderance of the credible, relevant evidence that Respondent violated a lawful order issued by Sergeant Silverstein to stop

associating with Maurice Joiner. The credible evidence in the record establishes that Silverstein gave Respondent an order on November 16, 2018 to stop associating with Maurice Joiner because he had a criminal history (T. 125, 137, 140). There is no dispute that Silverstein had the lawful authority to issue such an order and Respondent was obliged to obey it. It is further undisputed that subsequent to Silverstein's order, Respondent associated with Maurice Joiner on three occasions, as set forth in the findings under Specification 1. As I noted above, I find Respondent's assertion that he misunderstood Silverstein's order unpersuasive.

Accordingly, I find him Guilty of Specification 3.

Specification 4: Misuse of Department Databases

I find that the Department has met its burden by a preponderance of the credible, relevant evidence that Respondent misused Department databases on eight occasions by conducting criminal records checks unrelated to Department business.

Lieutenant Orecchia's credible testimony established that Respondent made eight criminal records searches between May 8, 2018 and June 1, 2019 which were unrelated to Department business, which included searches pertaining to Maurice Joiner and Complainant (T. 176-177, 196, 202). Respondent admitted that he made searches pertaining to Maurice Joiner and neither sought, nor obtained, permission from a supervisor before conducting them, and further admitted to making searches pertaining to Complainant (T. 325, 329).

Based upon the foregoing, I find Respondent Guilty of Specification 4.

PENALTY

In order to determine an appropriate penalty, the Tribunal, guided by the Department Disciplinary System Penalty Guidelines ("Disciplinary Guidelines"), considered all relevant facts

and circumstances, including any aggravating and mitigating factors established in the record. Respondent's employment record was also examined (*See* 38 RCNY §15-07). Respondent was appointed to the Department on July 8, 2008; information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

The Department Advocate has recommended that Respondent be terminated. For the reasons set forth below, I concur with his recommendation.

The presumptive penalty for a physical act of domestic violence is 30 suspension days, dismissal probation and a 24-week counseling program; the aggravated penalty is termination. Similarly, the presumptive penalty for violating an order of protection is 30 suspension days plus other conditions; the aggravated penalty is termination. The presumptive penalty for making a misleading official statement is 30 penalty days and dismissal probation; the aggravated penalty is termination.

This Respondent has a formal disciplinary history, which supports the aggravated penalty of termination. This is not his first domestic incident: in 2016, Respondent was found guilty of being involved in a verbal and physical altercation with his girlfriend, as well as taking her cell phone from her as she attempted to communicate with 911 operators.

In that case, Respondent was found to have engaged in a verbal dispute with his girlfriend while they were in his car. While he was driving, the verbal dispute became physical, resulting in his girlfriend calling 911. The 911 recording demonstrated that his girlfriend's report was cut off by Respondent just she identified her assailant as a police officer. Once Respondent stopped his car, he dragged his girlfriend from it while still in possession of her telephone. He forfeited 32 pre-trial suspension days for this misconduct.

Respondent has been found guilty of assaulting Complainant by grabbing her by the neck; violating an order of protection issued in favor of Complainant because of his assault; and

making misleading statements during an official interview. I find the presence of the following additional aggravating factors:

- a. Respondent engaged in stalking behavior by appearing at Complainant's residence unannounced and refusing to leave until she returned his toiletries;
- b. Respondent entered Complainant's apartment building without her permission after she had made it clear earlier that day that she did not want any contact with him;
- c. Respondent assaulted Complainant in front of her apartment just after she let her children inside.

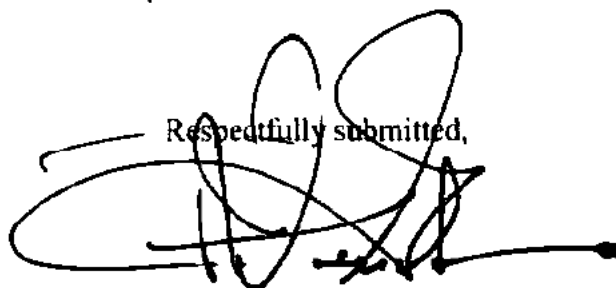
Separate acts of misconduct evince a pattern of behavior indicative of Respondent's inability to follow Department rules.

I find no evidence of mitigation in the record.

Respondent has violated his oath as a Member of Service by assaulting a former girlfriend and continuing to stalk her, even after he was arrested for the assault. While dealing the end of a personal relationship might prove challenging for anyone, more is demanded from a Member of Service. Based upon Respondent's recidivist history, his continued presence in this Department is antithetical to its values and mission.

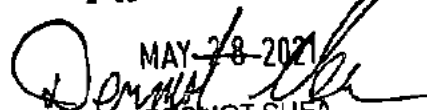
Based upon the foregoing, I recommend that, pursuant to Section 14-115 of the Administrative Code of the City of New York, Respondent be DISMISSED from the Department.

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED

MAY 28 2021

DERMOT SHEA
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER ERNESTO MARKS
TAX REGISTRY NO. 946759
DISCIPLINARY CASE NOS. 2018-19127 & 19143; 2020-21688

Respondent was appointed to the Department on July 8, 2008. On his three most recent annual performance evaluations, he received 3.5 overall ratings of "Highly Competent/Competent" for 2014, 2015, and 2016. Respondent has been awarded one medal for Excellent Police Duty and two medals for Meritorious Police Duty.

Respondent has a disciplinary and monitoring history. In 2011, Respondent forfeited ten (10) vacation days after he pled Guilty to being absent from his residence without permission while on sick report. In 2016, Respondent forfeited 32 pre-trial suspension days for (i) being involved in a verbal and physical altercation with his girlfriend and (ii) taking away her cell phone as she attempted to communicate with 911 operators. In connection with that matter, Respondent was placed on Level 2 Discipline Monitoring from September 9, 2015, through March 17, 2017.

In connection with the instant matters, Respondent was suspended on both June 8, 2018 and June 13, 2018. Respondent was thereafter suspended again from February 25, 2020 to March 26, 2020, at which time he was placed on modified assignment. He was also placed on Level 2 Discipline Monitoring on July 13, 2018. Respondent's monitoring and modified status remain ongoing.

For your consideration.

Paul M. Gamble
Assistant Deputy Commissioner Trials